**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**REGION SIX**

**UPMC AND ITS SUBSIDIARY, UPMC PRESBYTERIAN SHADYSIDE, SINGLE EMPLOYER, d/b/a UPMC PRESBYTERIAN HOSPITAL AND d/b/a UPMC SHADYSIDE HOSPITAL**

**and** **Cases 06-CA-102465, et al.**[1]

**SEIU HEALTHCARE PENNSYLVANIA, CTW, CLC**

**COUNSEL FOR THE GENERAL COUNSEL'S RESPONSE IN OPPOSITION TO RESPONDENT'S MOTION FOR FULL-BOARD RECONSIDERATION**

Counsel for the General Counsel files this response in opposition to the Motion for Full-Board Consideration ("Respondent's Motion") filed by Respondent UPMC Presbyterian Shadyside ("Respondent") with the Board on September 24, 2018, pursuant to Rule 102.48(c) of the Board's Rules and Regulations ("Board's Rules").

## I. INTRODUCTION

Following a lengthy hearing and subsequent briefing, the Board issued its Decision and Order in this matter on August 27, 2018. *UPMC*, 366 NLRB No. 185 (Aug. 27, 2018) (the "Decision"). The Board's well-reasoned Decision found that Respondent violated Section

[1] The list of case numbers in the heading of Respondent's Motion erroneously includes Case 06-CA-102566. The Charging Party requested on May 8, 2015 that Case 06-CA-102566 be withdrawn. Case 06-CA-102566 was severed and remanded to the Regional Director for Region Six by order of the Board on September 14, 2015. The Regional Director approved the withdrawal request on February 2, 2016, and the case was closed the same day.

8(a)(1), (2), (3), and (4) of the Act, and ordered that Respondent take certain affirmative actions to remedy its extensive unlawful conduct.

Respondent now seeks to have the Board reconsider its Decision, suggesting that the Decision is not supported by the record. As described in more detail below, Counsel for the General Counsel respectfully submits that the Board's Decision is fully supported by Board precedent and the extensive record in this matter, and urges the Board to deny Respondent's Motion for Full-Board Reconsideration.

## II. RESPONDENT'S MOTION MUST BE REJECTED OUTRIGHT BECAUSE IT DOES NOT COMPORT WITH BOARD RULE 102.48(c).

Counsel for the General Counsel opposes Respondent's Motion in its entirety and urges the Board to reject the Motion and not revisit its Decision. First and most fundamentally, Respondent's Motion does not meet the requirements set forth in Section 102.48(c) of the Board's Rules, which requires that a motion for reconsideration be supported by a showing of "extraordinary circumstances" sufficient to justify the Board's re-examination of a decision which it has already issued. Instead, Respondent relies primarily on facts, arguments and legal authority that the Board has already considered - and correctly rejected - in its meticulously analyzed Decision. In fact, Respondent fails to articulate in its Motion *any* circumstances as being so "extraordinary" as to justify the Board's reconsideration of its Decision. Other than when quoting the relevant Board Rule, Respondent does not even utilize the phrase "extraordinary circumstances" in its Motion. Having failed to make the requisite showing of "extraordinary circumstances" that would warrant reconsideration, Respondent's Motion must be denied.

Further, Respondent's Motion specifically seeks "Full-Board Reconsideration". The Board's Rules do not contemplate such a reconsideration, and Respondent has not suggested that

any of the three Board members on the panel that decided this case were not qualified to participate in this Decision. This request should be denied.

By its Motion, Respondent has asked the Board to reconsider three specific aspects of its Decision, and yet, in footnote 2 of Respondent's Motion, Respondent urges the Board to reconsider its Decision " . . . in its entirety . . .", citing to the exceptions to the Administrative Law Judge's Decision Respondent filed previously with the Board. Counsel for the General Counsel submits that this blanket request for reconsideration of the Board's full decision in this matter should be denied, as it fails to meet the fundamental requirements of Rule 102.48(c)(1), which states, in part, that "[a] motion for reconsideration *must state with particularity* the material error claimed . . . ." (emphasis added) Other than the three specific issues raised in its Motion, Respondent has failed to meet the fundamental requirements of the rules in its broad request that the Decision be reconsidered in its entirety. This broad request should be denied.

Counsel for the General's responses to the three specific areas raised in Respondent's Motion are set forth below.

## III. RESPONDENT'S MOTION FOR RECONSIDERATION OF THE BOARD'S REMEDIAL ORDER SHOULD BE DENIED.

In its Decision, the Board ordered that Respondent, *inter alia*, post the requisite Notice to Employees for 120 days, and that Respondent allow a representative of SEIU Healthcare Pennsylvania, CTW, CLC (the "Charging Party" or the "Union") to be present, upon request, when the contents of the Notice is read to Respondent's employees. 366 NLRB No. 185, slip op. at 7. Respondent has requested that the Board reconsider these remedies, arguing that they are not justified by the underlying record, and are not supported by Board precedent. Counsel for the General Counsel urges the Board to reject Respondent's request to reconsider these remedies,

as they are fully justified by record evidence of an overwhelming number of unfair labor practices Respondent was correctly found to have committed, and extant Board law.

It is well-established that the Board has "broad discretion" to impose an appropriate remedy to fit the circumstances presented by a particular case. *Excel Case Ready*, 334 NLRB 4, 5 (2001), citing *Maramont Corp.*, 317 NLRB 1035, 1037 (1995). The Board has further held that when a respondent has ". . . committed serious and pervasive unfair labor practices in a successful effort to 'nip in the bud' the Union's organizational campaign", additional remedies are warranted. *Excel Case Ready*, 334 NLRB at 4. These serious unfair labor practices can include surveillance, interrogation, threats and discharges, all of which the Board found Respondent committed in this case.

The significant and pervasive unfair labor practices the Board correctly found that Respondent committed justify each of the extraordinary remedies it imposed. Respondent's conduct touched the most vocal and open supporters of the Union, as well as other employees in various departments throughout Respondent's facilities. Respondent employs thousands of employees who work a wide variety of shifts in various locations throughout the operation. An extended posting period is appropriate to ensure that all of Respondent's affected employees have an opportunity to review the Notice to Employees. The Board was well within its authority to order an extended posting period in this case.[2]

In addition, requiring Respondent to read the notice aloud to employees, in the presence of a Board Agent and, upon request, a representative of the Union, conveys the appropriate importance of the contents of the notice. The Board has held that such a reading allows

[2] It should be noted that while the Administrative Law Judge did not order an extended posting period, the Board considered the matter, and granted Counsel for the General Counsel's Limited Exception to the Administrative Law Judge's Decision in this regard.

employees to ". . . fully perceive that the Respondent and its managers are bound by the requirements of the Act." *Federated Logistics & Operations*, 340 NLRB 255, 258 (2003), rev. den. 400 F.3d 920 (D.C. Cir. 2005) (citation omitted). See also *OS Transport LLC*, 358 NLRB 1048, 1049, n. 7 (2012). In this case, in light of the variety and scope of Respondent's unfair labor practices, such a reading will emphasize the need for Respondent to adhere to the requirements of the Act going forward, and will effectively assure employees that their rights will be respected.

In its Motion, Respondent suggests that the remedies imposed by the Board in this case are not justified, in part, in light of Respondent's purported training of its managers (Respondent's Brief, p. 6), and its assertion that Respondent has a history of "productive bargaining relationships" with the Charging Party and other unions without a "high incidence" of violations of the Act. (Respondent's Brief, p. 8) Respondent's representations, however, are not supported by the record.

Respondent attempted to introduce evidence of managerial "training" at the hearing before the Administrative Law Judge, but the Administrative Law Judge correctly rejected such evidence.[3] (3126-3128) Moreover, though Respondent took exception to the Administrative Law Judge's ruling in this regard, the Board correctly overruled Respondent's exceptions on this issue. In addition, Respondent's characterization in its Motion of its bargaining relationships with the Charging Party and other unions is also not supported by the record. While there is

[3] Numbers in parentheses refer to the page numbers of the official hearing transcript.

In its opening statement at the hearing, Respondent's Counsel argued that it had trained ". . . over 1,000 managers and supervisors . . .". (35) Not only is Respondent's assertion in its Motion that "nearly 1,200 managers" had been trained (Respondent's Motion, p. 6) an exaggeration of Respondent's Counsel's representations at the hearing, but, as noted above, there is no evidence in the record to support either representation.

evidence in the record that Respondent has "longstanding" relationships with unions (2232-2233), there is no evidence in the record concerning either the nature of those relationships, the existence of such relationships at the facilities involved in this matter, the history of unfair labor practice allegations or violations in connection with those relationships. Counsel for the General Counsel thus urges the Board to reject these arguments contained in Respondent's Motion on the grounds that they are wholly unsupported by record evidence.

With respect to Respondent's request for reconsideration of the expanded notice posting requirements, the Board correctly found that the significant and pervasive unfair labor practices committed by Respondent justify an extended posting period.[4] As noted, Respondent's conduct touched the most vocal and open supporters of the Union, as well as employees in various departments throughout Respondent's vast UPMC Presbyterian Shadyside facilities. Respondent employs thousands of employees who work a wide variety of shifts in various locations throughout the operation. An extended posting period is appropriate and necessary to ensure that all of Respondent's affected employees have an opportunity to review the Notice to Employees.[5]

[4] The Administrative Law Judge mistakenly denied this requested relief, citing the lack of specific case support. In ordering the extending posting period, however, the Board noted that, subsequent to the judge's decision in this matter, the Board ordered extended notice periods in *Ozburn-Hessey Logistics, LLC,* 366 NLRB No. 177 (2018), and *HTH Corp. d/b/a Pacific Beach Hotel*, 361 NLRB 709 (2014). While Respondent argues that these two cases present fact patterns different than the instant case, Respondent has failed to show any material error in the Board's determination that an extended posting period is appropriate under the facts presented herein; nor has it shown the existence of any extraordinary circumstances which would warrant a reconsideration of the Board's decision. Moreover, while in both of the cited cases the Board ordered that the respondents post the requisite notice for three years, it is the Board's authority to order an extended posting, rather than the length of the posting in those cases, that is relevant herein. As the Board noted in both of those cases, it has ". . . broad discretion to exercise [its] remedial authority under Section 10(c) of the Act . . .", *Ozburn-Hessey*, 366 NLRB No. 177, slip op. at 13; *HTH Corp.*, 361 NLRB 709, 710.

[5] Pursuant to the settlement reached in Cases 06-CA-081896, et al., which contained specified remedies including reinstatement and backpay for employees Frank Lavelle and Ronald Oakes,

In this case, the Board found that Respondent engaged in an overwhelming number of unfair labor practices, including not only multiple incidents of threats, surveillance and interrogation, but the issuance of several unlawful disciplines, a suspension and four discharges.[6] In light of these serious violations of the Act, affecting so many of Respondent's employees, Counsel for the General Counsel submits that the Board appropriately ordered an extended notice posting period.

In addition, the Board ordered that, upon request, an agent of the Union may be present for the reading of the Notice to Employees. 366 NLRB No. 185, slip op. at 9. Respondent seeks reconsideration of this special remedy on that grounds that it inappropriately expanded upon the remedy ordered by the Administrative Law Judge. Contrary to Respondent's suggestion in its Motion, the Board did not invite the Union to "participate" in meetings with Respondent and the Board; nor did the Board order any "access rights" for the Union.[7] (Respondent's Motion, p. 10) The Board merely ordered that, upon request from either the Union or the Board, a representative of the Union may be *present* during the reading of the Notice to Employees. 366 NLRB No. 185,

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and notice posting for the standard 60 days, Respondent posted a Notice to Employees. As the Board correctly noted, the unfair labor practices involved in the instant proceeding occurred during and shortly after the time that the Notice to Employees was posted in connection with the earlier settlement. 366 NLRB No. 185, slip op. at 7-8. In these circumstances, it is appropriate to differentiate the prior Notice posting with the Notice posting in the instant matter, such that the Notice related to the instant matter is posted for a longer period. Respondent needs to appreciate, and the employees are entitled to the assurance, that continued unlawful conduct has more serious consequences.

[6] Respondent's argument that its unfair labor practices in this case affected only a small percentage of its employees (Respondent's Motion, pp. 6-7) is unsupported by record evidence, and ignores the fact that the impacted employees were among the most vocal and open supporters of the Union.

[7] Significantly, Counsel for the General Counsel sought access rights for the Union, but the request for that remedy was denied by the Administrative Law Judge, and the Board rejected Counsel for the General Counsel's exception to the denial.

slip op. at 9. No further participation or access is contemplated by the Board's order, and Respondent's characterization of the Board's order as a grant of access is disingenuous.

As described more fully above, the Board has discretion to impose whatever remedy it deems appropriate to address the unfair labor practices which it found Respondent to have committed. Despite Respondent's suggestions to the contrary, the unfair labor practices committed by Respondent in this case struck at the heart of the Union's organizing activities. Respondent has failed to show that the Board's allowance for a representative of the Union to be present at readings of the Notice amounts to a material error; nor has it articulated any extraordinary circumstances which would justify a reconsideration of the Board's decision.

In sum, the special remedies ordered herein are required to level the playing field and to restore the employees' Section 7 rights that have been so thoroughly trampled by Respondent's conduct. The Board provided sufficient justification for its Order, and the special remedies ordered by the Board are not punitive in nature. The remedies ordered herein are necessary for ensuring compliance with the Act in light of the significant number and nature of violations in this case and the severity of Respondent's conduct, and were within the Board's discretion to require of Respondent. Respondent has failed identify any "material error" in the Board's Decision; nor has it identified the "extraordinary circumstances" that the Rules require before the Board may reconsider its Decision regarding the remedies ordered in this case. Counsel for the General Counsel urges the Board to reject Respondent's request to reconsider the remedial aspects of its Decision and Order.

## IV. RESPONDENT'S MOTION FOR RECONSIDERATION OF THE BOARD'S FINDING REGARDING RESPONDENT'S UNLAWFUL INTERROGATION SHOULD BE DENIED.

In its Decision, the Board correctly upheld the Administrative Law Judge's finding that Respondent violated Section 8(a)(1) of the Act by interrogating employees regarding their activities on behalf of the Union, as well as about the activities of other employees on behalf of the Union. The Board held that it agreed with the Administrative Law Judge regarding the interrogation allegations " . . . for the reasons stated in his decision . . .". 366 NLRB No. 185, slip op. at 3. Despite Respondent's argument to the contrary, no new standard was announced or applied by the Board in reaching this conclusion. In addition, as noted above, Respondent has failed to identify any "extraordinary circumstances" which would justify a reconsideration of the Board's ruling on this issue.

The Board has held that an employer's interrogation of its employees does not establish a *per se* violation of the Act. Rather, like all Section 8(a)(1) allegations, the alleged interrogation must be analyzed to determine whether, "under all the circumstances," it would "reasonably tend to interfere with, restrain or coerce employees" in the exercise of their Section 7 rights. *Stevens Creek Chrysler Jeep Dodge, Inc.*, 353 NLRB 1294, 1295 (2009); *Bloomfield Health Care Center*, 352 NLRB 252 (2008), citing *Rossmore House*, 269 NLRB 1176, 1178, n. 20 (1984). When evaluating the "totality of the circumstances" surrounding the questioning, the Board considers such factors as the following: the background or history leading up to the interrogation; the nature of the information sought; the identity of the questioner; the place and method of the interrogation; and the truthfulness of the reply. *Intertape Polymer Corp.*, 360 NLRB 957, 958 (2014); *Phillips 66 (Sweeny Refinery)*, 360 NLRB 124, 128 (2014); *Rossmore House*, *supra* (in evaluating whether an employer violated the Act by questioning a known union supporter about

his support for the union, the Board reversed prior holdings that *any* questioning concerning one's union sympathies constitutes a *per se* violation, re-establishing the totality of the circumstances as the appropriate test).

Where there is no history of employer hostility toward, or discrimination against, union supporters, for example, and the nature of the questions is general and non-threatening, a violation may not be found. See, e.g., *Los Angeles Airport Hilton Hotel and Towers*, 354 NLRB 202 (2009) (interrogation about attendance at a union meeting was found to be unlawful where it occurred in the context of a warning being given for protected concerted activity; interrogation about what an employee would do in case of strike was not unlawful, where the employee initiated the conversation). See also, *Hoffman Fuel Co.*, 309 NLRB 327 (1992) (violation found where questioning was coupled with veiled threat and took place in context of a hostile conversation concerning why employer was giving everyone a hard time; there was no legitimate purpose for ascertaining employee's prospective union activities; and when employee said he would be active, employer stated management would have "to do what we need to do about that").

An unlawful interrogation violation may not be established, as well, where the employee and supervisor have a friendly relationship and the conversation in which the alleged interrogation occurred is casual and amicable. See, e.g., *Cardinal Home Products, Inc.*, 338 NLRB 1004, 1009 (2003) (interrogation three days after election was found to be lawful where it was conducted by a first-line supervisor in an informal setting, with a well-known union adherent). See also, *Toma Metals, Inc*., 342 NLRB 787 (2004) (no violation where low-level supervisor asked employee, who was the supervisor's wife's first cousin, "[W]hat is up with the rumor of the union and do you not think a union will help you?", in the context of a friendly

relationship and daily conversations; questioning was neither sustained nor repeated and employee did not hesitate to answer truthfully); and *Emery Worldwide*, 309 NLRB 185, 186 (1992) (no violation found where supervisor asked employee how he felt about the union while riding together in company vehicle; where there was no history of employer hostility towards or discrimination against union supporters; the statement was made in a context free of threats; the conversation was brief, casual and amicable; and the supervisor was first-line supervisor).

Notably, none of the instances of alleged interrogation in this matter arose in the context of "friendly relationships." Rather, all of the questioning took place in the context of Respondent's anti-union campaign and in furtherance of its effort to stop any momentum that the Union's organizing drive had gained following the settlement agreement reached in Cases 06-CA-081896, et al.

Where multiple instances of interrogation occur, as here, the Board will take into account all of those incidents rather than consider them in isolation. *Gardner Engineering, Inc.*, 313 NLRB 755 (1994), enfd. as mod., 115 F.3d 636 (9th Cir. 2000). Applying the Board's "totality of the circumstances" test to the facts in the instant case, the Administrative Law Judge correctly found that the evidence adduced at the hearing establishes clear violations of the Act with respect to the questioning of Leslie Poston, Ronald Oakes, Frank Lavelle and Chaney Lewis. The Board was correct to adopt the Administrative Law Judge's findings in this regard, and Respondent has failed to provide any justification for the Board to revisit its finding on this issue.

Notwithstanding Respondent's assertions to the contrary, the Board did not set forth a new standard for determining whether an employer's questioning of its employee is unlawful. Respondent suggests that its questioning of these employees in the context of an investigation into a potential rule violation somehow justified its unlawful interrogation. (Respondent's

Motion, p. 12) The Board stated specifically, however, that " . . . Respondent was *not* engaged in a lawful investigation of potential rule violations . . . ." 366 NLRB No. 185, slip op. at 3-4, n. 14 (emphasis added). Factually, these events occurred when Respondent's supervisors demanded that Lewis write a statement as to why he posted Union literature at Respondent's facility, notwithstanding Respondent permitted non-Union literature to be posted; and again when Respondent's supervisors questioned Lavelle and Oakes regarding their knowledge of, or participation in, Poston's lawful distribution of Union literature by email.

Respondent requests that the Board reconsider its finding that Respondent violated Section 8(a)(1) of the Act in connection with requiring employee Lewis to write a statement about his Union activity. (Respondent's Motion, p. 14, n. 5) Respondent's argument on this point mischaracterizes the Board's findings. The Board stated that " . . . it is no defense that the Respondent was merely investigating a potential rule violation." 366 NLRB No. 185, slip op. at 3, n. 12.[8] Given Respondent's history of animus toward the Union's campaign and its discriminatory conduct against employees who participated in that campaign, its demand that Lewis give a written statement about his union activity constitutes unlawful interrogation. The Board's correct and well-supported holding in this regard does not constitute a "material error" which would support a reconsideration of the Board's decision.

As to its interrogation involving Poston's email, the Board correctly noted the significance of Oakes' and Lavelle's recent reinstatement as part of the settlement of the earlier charges, and the connection between the letter about which they and Poston were questioned with Respondent's unlawful intent. As the Board observed, Respondent had already determined

[8] Because the Board found that Respondent's requirement that Lewis prepare a statement about his Union activity, unrelated to any rule violation, *The Boeing Co.*, 365 NLRB No. 154 (2017), is not implicated herein.

that the conduct in which they had engaged would result in discipline. 366 NLRB No. 185, slip op. at 3-4, n. 14.

Simply put, Respondent questioned these employees about their union activity, and the questioning therefore violated Section 8(a)(1) of the Act. No new standard was imposed by the Board. Rather, the Board justifiably held, as did the Administrative Law Judge, that Respondent unlawfully interrogated these employees about their union activities.

In sum, Respondent has failed to provide any valid basis for the Board to reconsider its ruling on this issue. Significantly, Respondent does not dispute the underlying facts as found by the Administrative Law Judge and adopted by the Board. Respondent has failed to identify any material factual error in the Board's findings; nor has Respondent articulated the requisite extraordinary circumstances to justify the Board's reconsideration of its Decision. Accordingly, Counsel for the General Counsel respectfully requests that Respondent's motion in this regard be denied.

## V. RESPONDENT'S MOTION FOR RECONSIDERATION OF THE BOARD'S FINDING THAT RESPONDENT UNLAWFULLY ESTABLISHED THE ESS EMPLOYEE COUNCIL SHOULD BE DENIED.

Respondent contends that the Board's conclusions regarding the illegality of the ESS Employee Council are not based upon the record in this matter. (Respondent's Motion, p. 15) Counsel for the General Counsel submits that the Board's well-reasoned decision on this issue is fully grounded in the record, as well as in Board precedent. Respondent has failed to show the requisite justification for reconsideration of the Board's findings regarding Respondent's unlawful establishment of the ESS Employee Council, and Respondent's Motion on this issue should denied.

By its Motion, Respondent merely argues again, as it did in its Exceptions to the Administrative Law Judge's Decision, that it did not violate the Act by establishing the ESS Employee Council. This, alone, does not justify a reconsideration of the Board's conclusion on this issue. Respondent suggests that the Board erred in reaching this conclusion in "multiple respects". (Respondent's Motion, p. 15)

First, Respondent contends that the Board erred in stating that the record evidence on this issue is "largely undisputed". A review of the record shows that the Board's finding regarding the record evidence is correct. The idea for the Employee Council originated with Respondent. Specifically, Housekeeping Manager Dan Gasparovic testified that he established the Employee Council after John Krolicki, Respondent's Vice-President of Operations, directed him to do so. (2999, 3031)

To support this argument, Respondent merely points to the exceptions it filed to the Administrative Law Judge's findings and decision, which the Board has already considered and properly rejected. Respondent may not now use its Motion as a vehicle to re-argue its case to the Board. The basic facts surrounding the establishment of the ESS Employee Council are clear, as both the Administrative Law Judge and the Board correctly found. 366 NLRB No. 185, slip op. at 4. Respondent's disagreement with this conclusion, without more, does not justify reconsideration of the Board's findings on this issue.

Second, Respondent disputes the Board's statement that minutes of ESS Employee Council meetings were posted at Respondent's facility. 366 NLRB No. 185, slip op. at 5. Respondent argues that there is no support in the record for this assertion. (Respondent's Brief, p. 16) In fact, however, the record does reflect that monthly Employee Council reports from the staff meetings, along with announcements of the Employee of the Month Award winners,

appeared in the minutes of the monthly staff meetings, which Respondent regularly posted on its official-use bulletin boards. [GCX-83(a-e); [9] 1371] Thus, the Board was completely accurate in stating that minutes of ESS Council meetings were posted at Respondent's facility.

Even if, assuming *arguendo*, it is not clear from the record that minutes of ESS Employee Council meetings were posted on bulletin boards, this is not material to the Board's conclusion on this issue. In order to prove a Section 8(a)(2) violation, the Board applies a two-part test. *Electromation, Inc.*, 309 NLRB 990, 993-994 (1992), enfd. 35 F.3d 1148 (7th Cir. 1994). See also, *Polaroid Corporation*, 329 NLRB 424 (1999). First, one must establish that the subject group or committee constitutes a "labor organization" within the meaning of Section 2(5) of the Act. If so, then the second part of the test is addressed; that is, whether the employer has "dominated," "interfered with," or "supported" the group. If the answer is "yes," the committee and the employer's conduct with respect to that group, are deemed unlawful. The subjective interest of the employees is not relevant, as the Board correctly found.

The record reflects that Respondent provided the ESS Employee Council with bulletin boards designated specifically for the Council's use. More particularly, the Employee Council proposed that Respondent designate certain bulletin boards in Respondent's facility for the exclusive use of the Employee Council, on which they could post items related to the committee's activities. (1362) Respondent's management representative then instructed the maintenance staff ". . . to put up a new bulletin board on both sides for [the Council's] use". (1362) Once the bulletin boards were installed, members of the Council decorated the bulletin boards, which featured cut-out letters at the top stating, "Employee Council". (1362-1363) Thus, the Board correctly found that Respondent supplied the bulletin boards and gave permission to

[9] "GCX" refers to General Counsel's Exhibits.

the Employee Council to use them. 366 NLRB No. 185, slip op. at 4. These designated bulletin boards were also used to publicize winners of the "Employee of the Month" award (GCX-197; 673, 674, 676), to inform employees of work-related topics that the Employee Council addressed, as well as various social and team-building items. (3011)

Finally, in its Motion, Respondent suggests that the Board should reconsider its finding on this issue because the Board supposedly engaged in speculation as to the level of employee interest in the Council. In its Decision, the Board specifically stated that it found " . . . little relevance in the fact that the council ceased operating when the employees lost interest in it." 366 NLRB No. 185, p. 6, n. 19. Contrary to Respondent's suggestion in its Motion, the level of employee interest played little or no role in the Board's conclusion that Respondent violated the Act by establishing the ESS Employee Council. Employee interest in the Council is not relevant to a determination of whether the establishment of the Council violated the Act. Respondent has again failed to state any material error that would justify a reconsideration of its conclusion that Respondent violated Section 8(a)(2) of the Act as alleged.

There is no question that Respondent established bulletin boards solely for use of the Council, Respondent established the Council, and the Council dealt, in part, with matters affecting employees' terms and conditions of employment. The Board's correctly found that the establishment and maintenance of the ESS Employee Council violated Section 8(a)(2) of the Act. Further, there is no "material error" as required by the Board's Rules to justify reconsideration of the Board's finding in this regard. Nor are there any extraordinary circumstances present that would warrant the Board's reconsideration of this issue.

## VI. CONCLUSION

Respondent points to only three aspects of the Board's Decision to support its Motion, but has failed to identify any "extraordinary circumstances" that warrant reconsideration of the Board's Decision in this matter. Thus, Respondent has failed to meet the threshold requirement for reconsideration as set forth in the Board's Rules. Further, Respondent has failed to identify any "material error" in the Board's Decision that would warrant reconsideration. In addition, there is no provision for full-Board reconsideration in the Board's Rules.

In conclusion, and for the reasons stated more fully above, the General Counsel urges the Board to deny Respondent's Motion for Full-Board Reconsideration.

Dated at Pittsburgh, Pennsylvania, this 19th day of October, 2018.

Respectfully submitted,

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